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In the Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the construction of a railroad classification yard requires Commission approval under 49 U.S.C. (Supp. V) 10901(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 711 F.2d 364. The Commission's final opinion (Pet. App. 14a-22a) is reported at 366 I.C.C. 69. The initial agency opinion (Pet. App. 23a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on June 30, 1983. The petition for a writ of certiorari was filed on September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. (Supp. V) 10901,[1] the Interstate Commerce Commission is authorized to determine whether

[1] Essentially the same provision formerly appeared in 49 U.S.C. 1(18), which was added to the Interstate Commerce Act by 41 Stat. 477 (Feb. 28, 1920).

the public convenience and necessity permits extensions of "railroad lines" operating in interstate commerce. Constructing a "railroad line" without first obtaining Commission certification is unlawful, and may be enjoined by a United States District Court in an action brought by the Commission, the United States, or an affected state. 49 U.S.C. (Supp. V) 11702(a)(1), 11703(a), 11505.[2] The Interstate Commerce Act (the Act), specifically excepts from the reach of Section 10901 the construction and operation of "spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. (Supp. V) 10907(b)(1).[3] Consequently, before the Commission can consider the merits of a proposed construction project, or before a district court may enjoin rail construction, it must first determine whether, based on the facts of record, the trackage at issue is subject to the certification requirement of the Act.

2. This proceeding involves the proposed construction by the Missouri Pacific Railroad Company (MoPac) of a classification yard approximately 19,217 feet long and 2,000 feet wide to be located adjacent to a MoPac main line in Louisiana. MoPac instituted an eminent domain proceeding in a Louisiana state court to take land belonging to petitioner and others that is necessary for the project (C.A. App. 4).[4]

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[2]Moreover, any person knowingly authorizing, consenting to, or permitting a violation of the certification requirement is subject to a civil penalty of up to $5,000 (49 U.S.C. (Supp. V) 11901(d)).

[3]This provision was previously contained in 49 U.S.C. 1(18)(d). See note 1, *supra*.

[4]*Missouri Pac. R.R.* v. *Nicholson*, Civil Action No. 17299 (La. Dist. Ct. 1981). Judgment has been rendered for MoPac in that case, and Nicholson's appeal of that judgment is currently pending (MoPac Br. in Opp. 4).

3. Because MoPac had not requested Commission authorization for the construction, petitioner sought a cease and desist order from the Commission to prevent MoPac from constructing the yard.[5]

MoPac moved to dismiss the complaint, on the ground that its proposed classification yard was not a "railroad line" within the meaning of Section 10901 (C.A. App. 25-26). An employee review board dismissed the complaint as not ripe for Commission review (Pet. App. 23a-25a). On administrative appeal, the Commission found the complaint to be ripe, but affirmed the dismissal after concluding that the proposed classification yard was not a "railroad line" requiring Commission authorization under Section 10901 (Pet. App. 14a-22a).[6] In reaching this conclusion, the Commission emphasized that the operations to be performed at the yard would be merely incidental to line-haul transportation (*id.* at 21a). Thus, the yard track here would be used only to store, switch and classify cars; the line-haul transportation would continue over MoPac's existing main line. Moreover, no shippers are located in the vicinity or would be directly served from the yard, and no lines of any other carrier would reach the proposed yard to permit the connection of two carriers (*id.* at 20a-21a).[7]

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[5]Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Company joined petitioner in the complaint before the Commission (Pet. App. 23a). Although Halloway Planting Company originally joined petitioner in seeking reversal of the Commission decision before the court of appeals, it voluntarily withdrew before the court of appeals issued its decision.

[6]The Commission observed that it had never authorized the construction of a classification yard, although many such yards exist(Pet. App. 19a). And it noted that, in the few cases raising the issue, the courts and the Commission have found yard track to be exempt (*id.* at 20a).

[7]The Commission rejected the argument that it should examine the construction because substantial expenditures would be involved, explaining that its jurisdiction under Section 10901 is limited, and generally arises when the construction would permit a carrier to penetrate a new market (Pet. App. 21a n.8).

4. The court of appeals affirmed (Pet. App. 1a-13a) the agency's decision. The court found it to be well established that the distinction between a "railroad line" requiring Commission authorization under Section 10901(a), and "spur * * * switching, or side" track exempt under Section 10907(b), "turns on the intended use of the track segment, not on the label or cost of the segment" (Pet. App. 7a). Following the guiding principles enunciated by this Court in *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926), the court of appeals concluded (Pet. App. 8a-9a (footnote omitted)) that:

> track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).

Applying these principles to this case the court held that MoPac's proposed construction of a classification yard was exempt from Commission jurisdiction (Pet. App. 9a).

ARGUMENT

Petitioner asks this Court to review the Commission's conclusion, based on its interpretation of the terms of its governing statute, that it had no jurisdiction to issue a certificate of public convenience and necessity for the construction of this classification yard. An agency's interpretation of the terms of its own jurisdictional statute is entitled to substantial deference (*Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 304 n.14 (1977)). Petitioner suggests nothing that would justify overturning that agency interpretation where, as here, it is consistent not only with the plain

language and purpose of the statute, but also with long-standing agency practice and judicial precedent. The court of appeals has carefully reviewed the agency's conclusion and affirmed it. There is no warrant for further review of this fact-bound case.

Although 49 U.S.C. (Supp. V) 10901(a) prohibits a rail carrier from constructing or extending a "railroad line" unless the Commission finds such construction consistent with the public convenience and necessity, Section 10907(b) exempts from this requirement the construction of "switching * * * tracks * * * to be located, entirely in one State." The trackage involved here is to be located entirely in Louisiana, and is to be used solely for classification of cars—*i.e.*, switching.[8] The yard operations will be incidental to line-haul transportation; through traffic will continue to use MoPac's existing main line, and the yard will not enable MoPac to serve any new territories or markets, connect with other carriers, or directly serve any new shippers. Applying the plain statutory language to these undisputed facts, the Commission (Pet. App. 21a) and the court of appeals (*id.* at 7a) correctly concluded that the proposed trackage was exempt as switching tracks.[9]

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[8]Petitioner suggests (Pet. 11 n.9) that the proposed classification yard involves more than switching. The process of classifying cars, however, involves nothing more than arranging cars into a particular sequence by switching cars over switching track. A classification yard is thus simply a yard composed of switching tracks.

[9]Petitioner argues (Pet. 9) that, because the term "railroad" is defined at 49 U.S.C. (Supp. V) 10102(19) to include "yard," while the Section 10907 exemption does not include the word "yard" the Commission's construction approval authority over any "railroad line" in Section 10901 must include authority over a "yard," and a "yard" cannot be exempt under Section 10907. But that argument is based on the clearly erroneous assumption that the terms "railroad" and "railroad line" are equivalent. Cf. *Long Island R.R.* v. *New York Central R.R.*, 281 F.2d 379, 382-384 (2d Cir. 1960); *New York Dock Ry.* v. *Pennsylvania R.R.*, 62 F.2d 1010, 1012-1014 (3d Cir. 1933). "Ground" is also included in the

The statutory construction adopted by the Commission and the court of appeals in this case is consistent with the legislative intent evident in the Interstate Commerce Act's distinction in Sections 10901 and 10907 (and their predecessors) between trackage used in the movement of through traffic between the shipper and the consignee ("railroad line") and trackage used only incidentally for loading, unloading, storage and switching. See, *e.g., Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926). While Congress was concerned with major railroad expenditures, it did not confer upon the Commission jurisdiction to review all such expenditures, but only those involving construction of a new railroad line. See *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry., supra; Chicago Great Western Ry.* v. *Illinois Central R.R.*, 275 F. Supp. 909 (1967). Expenditures, however large, that do not extend a carrier's lines, but are made simply to improve existing service, remain within the managerial discretion of the railroad.[10]

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definition of "railroad" and is not mentioned in Section 10907. Accordingly, as the Commission noted (Pet. App. 19a n.5), petitioners' reasoning would lead to the absurd conclusion that a carrier needs Commission approval before acquiring ground to be used to construct a communication facility, which, of course, it does not. While the Commission has general regulatory jurisdiction over the operations of a "railroad," it does not have specific authority over all railroad construction under Section 10901—just that which produces a "railroad line."

[10]The cases cited by petitioner (Pet. 10-11) do not suggest that the financial cost of a project determines whether a "railroad line" is involved. Instead, those cases all clearly involved line extensions and applied the same standards used here.

In *Texas & Pac. Ry.*, Santa Fe sought to build track that extended into territory it had not previously served and that was already served by another carrier. *Railroad Comm'n* v. *Southern Pacific*, 264 U.S. 331 (1924), involved, inter alia, the substantial extension of main tracks. *Detroit & M. Ry.* v. *Boyne City, G. & A. R.R.*, 286 F. 540 (E.D. Mich. 1923) involved construction of track and institution of train service between new territory and points already served by another carrier.

Although the statutory provisions requiring Commission approval of railroad line construction and exempting switching track have been in existence for many years (see notes 1 & 3, *supra*), and classification yards are a longstanding incident of rail transportation, the Commission has never regulated the construction of classification yards. Such long-standing administrative inaction is, of course, due great weight. *United States* v. *Chicago North Shore & M. R.R.*, 288 U.S. 1 (1933); accord, *Long Island R.R.* v. *New York Central R.R.*, 281 F.2d 379 (2d Cir. 1960). It clearly reflects a general understanding, unchallenged until now, that classification yards are exempt.[11] Thus, the fact that there has never before been a specific ruling by the Commission or the courts that construction of classification yards is exempt does not make this a significant case requiring review by this Court.[12]

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[11]Petitioners incorrectly contend (Pet. 6-13) that the court of appeals announced a new principle of federal law that allows the Commission, despite the certification requirements of Section 10901, to "deregulate" the construction of railroad classification yards without consideration of the criteria of 49 U.S.C. (Supp. V) 10505. But there has been no "deregulation," since such construction has never previously been regulated. Moreover, because Section 10907 deprives the Commission of jurisdiction over such construction, the Commission had no basis for exercising its discretionary power to deregulate under the general exemption provisions of Section 10505. This case involves an application of the specific, nondiscretionary exemption contained in Section 10907, not an evasion of the requirements of Section 10505.

Similarly, the arguments of amici that the Commission should have considered the need to protect agricultural land (Amicus American Farm Bureau Br. 10-11) and the value of historical landmarks on the condemned property (Amicus Louisiana Landmarks Society Br. 2-3) overlook the fact that Section 10907 leaves the Commission no jurisdiction to consider the construction at all. Cf. *Railroad Comm'n* v. *Southern Pacific*, 264 U.S. 331, 346 (1924) (cost of construction a factor to be considered when Section 10901 properly invoked).

[12]Nor does this case establish any new legal principle, as petitioner contends (Pet. 9, 12-13). Instead, it simply applies the principle, enunciated by this Court in 1926 in *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. at 278, that the proposed construction of "[t]racks * * * to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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improve the facilities required by shippers already served by the carrier or to supply the facilities of others * * * within the same territory and similarly situated * * * [presents questions that] depend[] largely upon local conditions which the state regulating body is peculiary fitted to appreciate." See also *Detroit & M. Ry.* v. *Boyne City, G. & A. R.R.*, 286 F. 540, 547 (E.D. Mich. 1923) (construction of tracks used in "the actual transportation haul from the shipper to the consignee" subject to federal regulation, while those used in "loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul" are exempt); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160, 165-166 (5th Cir. 1966) (same); *Georgia S. & Fla. Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) (construction of proposed classification and switching yard not subject to Commission approval); *Oregon-Washington R.R. & Navigation Co. Construction*, 275 I.C.C. 591, 598 (1950) (same); *Terminal Ry. Alabama State Docks—Operation*, 354 I.C.C. 747 (1978) (same).

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